APPENDIX A

**Memorandum Opinion, April 9, 1991,
U.S. District Court for the
Middle District of Alabama, in
E.L. Clark, et al. v. *Derrill Crowe, et al.***

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 86-T-139-N

E. L. CLARK and CITY FEDERAL
SAVINGS AND LOAN ASSOCIATION,
Plaintiffs,

v.

DERRILL CROWE, *et al.*,
Defendants.

MEMORANDUM OPINION

In the present phase of this litigation, plaintiff E. L. Clark, who owns a number of buildings in Alabama designed for use as nursing homes, charges that certain "state defendants" deprived him of his protected property interest in two of his nursing homes, in violation of the due process clause of the fourteenth amendment to the United States Constitution as enforced through 42 U.S.C.A. § 1983 (West 1981). The state defendants are members of the State Health Planning and Development Agency and are hereinafter referred to together as "SHPDA". Clark has invoked the court's jurisdiction pursuant to 28 U.S.C.A. §§ 1331, 1443 (West 1966,

1973 & Supp. 1990), and he seeks both declaratory and injunctive relief. City Federal Savings and Loan Association, which holds mortgages on Clark's nursing homes, is also a plaintiff in this lawsuit and joins in the claim asserted by him.

Based upon the evidence presented at a nonjury proceeding, the court concludes that Clark should prevail on his § 1983 claim and that he is entitled to appropriate declaratory and injunctive relief.

I. FACTUAL BACKGROUND

Clark is the owner of two nursing home facilities in northern Alabama. He constructed the first facility, located in Albertville, in 1961, and the second facility, located in Guntersville, in 1978. Clark operated both nursing homes, which together offered 236 beds, until he leased them to other operators in the late 1970's.[1] He leased the Albertville facility to Audrey Earle Cole and the Albertville Nursing Home, Inc. He leased the Guntersville facility to E. Brooks Barfield and Barfield Health Care, Inc.

Alabama, like many other states, closely regulates the nursing home inndustry within its borders. Chapter 21 of Title 22 of the 1975 Code of Alabama (Michie 1990) sets forth detailed regulations on a wide variety of aspects of this industry. Among these regulations, and of particular relevance to this case, is the requirement that any person desiring to construct or expand a new nursing home facility within the state or to offer new services at an existing facility must obtain a "certificate of need," more commonly called a CON, from SHPDA.[2] A CON is a state authorization designed to "assure that only those health care services and facilities found to be in the

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[1] The Albertville nursing home had 133 beds, and the Guntersville nursing home had 103 beds.

[2] 1975 Alabama Code § 22-21-265 (Michie 1990).

public interest shall be offered or developed in the state," and to "prevent the construction of unnecessary and inappropriate health care facilities through a system of mandatory reviews."[3] In furtherance of these purposes, SHPDA may award a CON only after making a factual finding that the new facility and service are consistent with the state plan and are necessary to satisfy local demand and that no more effective or efficient alternative exists.[4] SHPDA developed and used a "bed need methodology" to carry out these statutory directives. The agency determined how many nursing home beds were needed for each of Alabama's 67 counties and authorized beds for each county only up to that county's number. An individual holding CON authority for a certain number of beds retains it until he relinquishes it by no longer

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[3] § 22-21-261.

[4] Section 22-21-266 provides that:

> No certificate of need for new inpatient facilities or services shall be issued unless the SHPDA makes each of the following findings:
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> (1) That the proposed facility or service is consistent with the latest approved revision of the appropriate state plan effective at the time the application was received by the state agency;
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> (2) That less costly, more efficient or more appropriate alternatives to such inpatient service are not available, and that the development of such alternatives has been studied and found not practicable;
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> (3) That existing inpatient facilities providing inpatient services similar to those proposed are being used in an appropriate and efficient manner consistent with community demands for services;
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> (4) That in the case of new construction, alternatives to new construction (e.g., modernization and sharing arrangement) have been considered and have been implemented to the maximum extent practicable; and
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> (5) That patients will experience serious problems in obtaining inpatient care of the type proposed in the absence of the proposed new service.

offering the service for a 12-month period.[5] The Alabama Department of Public Health still retained the authority to license nursing homes; however, it could license only fewer, not more than, the number of beds SHPDA approved for an area.[6]

An applicant for a CON must provide sufficient information and technical data to allow SHPDA to assess the merits of the application and to make the necessary findings of fact to support the issuance of the certificate.[7] SHPDA developed two types of procedures for reviewing applications: the first is plenary and affords an extensive review process; the second is more truncated and may be used only in an emergency, where patients are endangered by a lack of health care facilities or by the conditions at existing facilities. On August 4, 1984, the Governor of Alabama issued an Executive Order placing a moratorium on the issuance of CONs in any but emergency situations.

The law requiring CONs went into effect in 1979. However, it required CONs for only new health care facilities and services, that is, those put into operation after the date of the law.[8] Persons already offering facilities and services on the date of the law could continue to offer them without a CON. These existing facilities and services were, in the words of Clay H. Dean, the

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[5] § 22-21-270(d); Plaintiff's exhibit no. 28. A holder may also relinquish the authority by disposing of the facility in some manner.

[6] § 22-21-276(b).

[7] § 22-21-267.

[8] Section 22-21-265(a) provides that:

> On or after July 30, 1979, no person to which this article applies shall acquire, construct or operate a new institutional health service, as defined in this article, or furnish or offer, or purport to furnish a new institutional health service, as defined in this article, or make an arrangement or commitment for financing the offering of a new institutional health service, unless such person shall first obtain from the SHPDA a certificate of need therefor.

person who drafted the CON legislation and who served as director of SHPDA, "grandfathered in". Under the CON statute, grandfathered facilities and services and those facilities and services with a CON certificate were, in effect, on a par. The CON statute, therefore, authorized a person to offer health care facilities and services in only two circumstances: first, if the person had obtained a CON from SHPDA; and, second, if the person was already offering the facilities and services when the CON statute went into effect. If a person sought to offer health care facilities and services under any other circumstances, SHPDA would consider the operation as illegal under the CON statute and would seek a court order to enjoin it.

As Clay explained further, the law therefore did not require that Clark or his two lessees, Cole and Barfield, obtain CONs for the Albertville and Guntersville facilities. Clark and his two lessees could continue to offer 236 beds at the two facilities without CONs; they would need a CON only if they decided to build a new facility or offer new services. The two facilities were, in effect, "grandfathered" in under the CON law.

The value of grandfathered facilities, such as those at Albertville and Guntersville, increased dramatically—particularly in those areas where the bed limit for the county was exhausted. The CON law, by restricting the number of beds which could be located in a county and by grandfathering in these existing facilities, conferred a new and independent value on these facilities. These facilities had CON status in a market where under the CON statute no new beds, or only a few, were available. These facilities, which could lose their CON status only if they ceased to offer health care facilities and services for a 12-month period, were obviously of much greater value as a nursing home than one without such authorization. Indeed, a facility without authorization was of no value at all as a nursing home.

In 1985, Cole and Barfield decided to open their own nursing homes. They submitted applications to SHPDA requesting that they be allowed, under the emergency CON provisions, to replace or relocate the 236 beds in the Albertville and Guntersville facilities to new homes. SHPDA approved the applications without giving notice to Clark. In 1986, Cole and Barfield moved into their new facilities, leaving Clark's structures vacant. Later, Clark applied to the Alabama Department of Public Health for a license to operate his nursing homes at Albertville and Guntersville. The Public Health Department denied his request because he did not have CON authorization for any beds in his facilities.

II. PROCEDURAL BACKGROUND

Clark filed this lawsuit in February 1986, claiming that numerous state officials acting together with private individuals, including Cole and Barfield, conspired to deprive him of his property rights to the Albertville and Guntersville nursing homes in violation of the due process clause as enforced by § 1983. In *Zinermon v. Burch*, —— U.S. ——, ——, 110 S.Ct. 975, 983 (1990), the Supreme Court explained that there are three types of claims that may be brought under the due process clause. The first relies on the specific protections in the Bill of Rights incorporated into the clause, and the second relies on a substantive component in the clause that "bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them." *id.*, quoting *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 664 (1986). "As to these two types of claims, the constitutional violation actionable under § 1983 is complete when the wrongful action is taken." *Id.* The third type of claim encompasses "a guarantee of fair procedure." *Id.*

Relying on the third type of claim, Clark contended that the defendants, acting under color of state law, de-

prived him of his beds in the Abertville and Guntersvile facilities. He alleged that the defendants did this by "negligently, wantonly, fraudulently and/or intentionally" using the CON emergency procedures when no emergency existed; he did not challenge the adequacy of the emergency procedures themselves, but rather claimed that the emergency procedures were inappropriately applied. The court dismissed his complaint on the basis that he enjoyed a sufficient state remedy for the injury he alleged.[9] The court based its dismissal on *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908 (1981), and *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194 (1984). In these two cases, the Supreme Court held that a post-deprivation remedial mechanism satisfied due process requirement in a situation involving negligent and intentional acts committed by state officials acting outside their grant of authority.

Clark amended his complaint after this ruling, challenging for the first time the adequacy of the emergency procedures by which Cole and Barfield had obtained their CONs. This amendment of the § 1983 claim presented the question of whether a pre-deprivation hearing was practicable and feasible in the context of the emergency CON statute. Clark claimed, in essence, that he should have received notice of, and an opportunity to be heard regarding, Cole's and Barfield's application to relocate or replace the beds in his two facilities. In his amended complaint, Clark also claimed that the decision to allow

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[9] Section 22-21-276 of the 1975 Alabama Code provides that:

> Injunctive relief against violations of this article or any reasonable rules and regulations of the SHPDA may be obtained from the circuit court of Montgomery county, Alabama, at the instance of the SHPDA, any holder of a certificate of need that is adversely affected in the exercise of privileges thereunder by such violation or any member of the public directly and adversely affected by such violation.

Cole and Barfield to relocate or replace the beds violated the due process clause because it was arbitrary and capricious. Finally, Clark claimed that the defendants entered into a racketeering enterprise with the goal and effect of depriving him of his property interest, in violation of the Racketeer Influenced and Corrupted Organizations Act (RICO), 18 U.S.C.A. §§ 1961-1968 (West 1984 & Supp. 1990).

Pursuant to the amendment, the court vacated its previous dismissal of Clark's lawsuit. The court noted that post-deprivation remedies do not satisfy the minimal requirements of procedural due process when pre-deprivation remedies are practicable. *E.g., Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 433-34, 102 S.Ct. 1148, 1156-57 (1982). Since the focus of Clark's § 1983 theory of relief shifted from the merits of Cole's and Barfield's applications in the allegedly arbitrary decisionmaking of the state defendants to the feasibility of a mandatory hearing in which interested parties could speak to an emergency CON application, the court found that *Parratt* and *Hudson* did not bar Clark's amended cause of action. When the plaintiff's challenge extends to the constitutional validity of an established procedure authorizing the state actor's conduct, the existence of a statutory post-deprivation remedy does not displace the plaintiff from his constitutional forum. *See Zinermon v. Burch,* —— U.S. at ——, 110 S.Ct. at 988 ("when [state] officials fail to provide constitutionally required procedural safeguards to a person whom they deprive of liberty, the state officials cannot then escape liability by invoking *Parratt* and *Hudson*"); *see also Fetner v. City of Roanoke,* 813 F.2d 1183, 1184-86 (11th Cir. 1987); *Messick v. Leavins,* 811 F.2d 1439, 1441-43 (11th Cir. 1987).

In a later order, the court found that Clark's § 1983 claim was viable against only SHPDA. The court also concluded that Clark's RICO claim was viable only

against the private defendants and that, because Clark's RICO claim is dependent on resolution of the constitutionality of the emergency CON procedures, the RICO claim should be stayed for trial until after the § 1983 claim is resolved. The court then proceeded to trial on Clark's § 1983 claim. The court also considered whether City Federal Savings and Loan Association, which holds mortgages on Clark's two nursing homes, has a similar viable claim under § 1983.

III. LEGAL DISCUSSION

A.

To obtain relief on his claim, Clark must prove that he had a property interest protected by the auspices of the due process clause of the fourteenth amendment and that the statutory procedure by which his interest was impaired failed to afford him adequate procedural safeguards. *See, e.g., Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 538, 105 S.Ct. 1487, 1491 (1985). At the end of the nonjury proceeding on his claim, all parties agreed that, if Clark had a protected property interest, he did not receive the process due him. In other words, if Clark was entitled to notice and an opportunity to be heard regarding Cole's and Barfield's applications, SHPDA could have given him such process before it acted on the applications, regardless as to whether the applications were made under the emergency procedures or the plenary procedures. The parties, therefore, agreed that the only determinative issue for the court is whether Clark had a protected property interest.

Federal courts have long recognized that, "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it" and "more than a unilateral expectation of it." *Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972). The person "must, instead, have a legitimate claim of

entitlement to it." *Id.* These claims or property interests find their definition and origin not in the United States Constitution but in existing rules or mutual understandings that stem from an independent source such as state law and that secure certain benefits and support claims of entitlement to those benefits. *Id.* Thus a close examination of the proffered state law basis for Clark's claim is necessary to evaluate the defendants' challenge. *See Davis v. Scherer*, 468 U.S. 183, 193 n.11, 104 S.Ct. 3012, 3018 n.11 (1984).

The court is convinced, from a review of Alabama law, that a person holding a CON issued by SHPDA has a protected property interest in that CON which can be taken away only if attended by adequate procedural protections. The CON statute provides that a person holding a CON retains the privileges authorized under it until he or she fails to offer the authorized health care facilities and services for a period of twelve months. The CON can, therefore, be terminated only for cause.

SHPDA maintains, however, that a person owning a facility grandfathered in under the CON statute is not similarly situated. The agency contends that, because the statute does not mention such persons, it does not reach such persons and thus has conferred nothing on them. The agency's view of the source of state law which may confer a property interest is much too narrow. As this court explained above, property interests arise not merely from the provisions in a state law but also from the "rules" and "understandings" stemming from that law. Therefore, although the CON law may not mention grandfathered facilities and services, the rules and understandings stemming from the law clearly include them.

As the court explained earlier, under SHPDA rules and regulations, grandfathered facilities and services and those facilities and services with CON certificates are clothed with the same legal privileges in at least two respects. First, a person is authorized to offer health care facilities

and services in only two circumstances: first, if the person has obtained a CON from SHPDA; and, second, if the person was already offering the facilities and services when the CON statute went into effect. If a person sought to offer health care facilities and services under any other circumstances, SHPDA would consider the operation as illegal under the CON statute and would seek to have a court enjoin it. SHPDA, therefore, treats the two types of authorization the same. Second, SHPDA rules and regulations provide that a grandfathered facility, like a CON certified facility, can forfeit its authorization only if it fails to offer its services for a 12-month period. Persons with grandfathered facilities and CON certified facilities have the same expectations of continued authorization. Therefore, persons with grandfathered facilities have the same "legitimate claim of entitlement" to continued authorization as do persons holding actual CON certificates.

SHPDA has suggested from time to time that there is no such notion as "grandfathered status" under either the CON statute or the rules and understandings adopted by SHPDA pursuant to the statute. This argument is disingenuous. The Rules and Regulations Manual adopted by SHPDA in 1979 expressly contains a "Grandfather Clause" covering existing facilities.[10] Moreover, the directors and board members of SHPDA have routinely used the term "grandfather status" to refer to such facilities.[11]

The final question for the court is whether Clark holds a grandfathered interest in the Albertville and Guntersville facilities. SHPDA argues that Clark was a simple landlord, who had at most only a property interest in the physical buildings at Albertville and Guntersville. The credible evidence before the court does not fully support this contention. The court agrees with Clay H. Dean,

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[10] Plaintiff's exhibit no. 127.

[11] *See, e.g.*, Plaintiff's exhibit no. 106 and testimony of Clay H. Dean and Kay Miller at trial.

the drafter of the CON legislation and a former director of SHPDA, that Clark leased more to Cole and Barfield than just physical plants. He leased nursing home operations to them. Clark and his tenants agreed that the tenants would continue to operate and administer nursing homes in the two facilities. An expressed condition in the lease contracts was, therefore, that the tenants would take over nursing home operations. Moreover, in one of the leases entered into by the parties, Clark leased a specific number of 'beds,' and calculated the rent by the number of beds in use in the building. This lease further provided that, should the tenant expand the nursing home beds in that facility, there would be a proportional increase in rent. The court agrees with Dean and finds from the evidence that Clark had a sufficient interest in the operation of the two facilities to enjoy a "grandfather status" when the CON statute went into effect in 1979.[12] The court cannot say that his status was exclusive, however. Cole and Barfield, as operators of the two nursing homes, also had an expectation in the continued operation of the two facilities when the CON law went into effect.[13]

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[12] There is a historical basis for this conclusion in the operation of SHPDA. For example, in the case of Geriatrics, Inc., SHPDA treated Geriatrics rather than its lessee as the party with grandfather status when the CON law went into effect.

Ideed, Derrill Crowe, who was a member of the SHPDA, admitted that if all the circumstances surrounding Clark's interest in the two homes had been known to the agency, the decision could have been different.

[13] SHPDA, Cole, and Barfield point out that Cole obtained an "Assurance of Need" certificate in the mid-70's. This certificate allowed Cole to obtain reimbursement of certain capital costs. It did not, by itself, convey to her any interest in the beds in the Albertville home. By the same token, Clark's inability to obtain a similar certificate for the Guntersville home in no way impaired his legal status as owner of the nursing home operation. It simply meant that he could not get the reimbursement he wanted.

The defendants further point out that Barfield obtained a CON for the Guntersville facility in early 1980. The evidence reflects,

Clark asks that the court determine who holds the superior interest. The court declines the invitation. The determination turns on more than just legal principles. Whether a lessor or a lessee of a nursing home operation should be considered as the superior holder of a grandfathered operation is more than likely also a matter of policy. Indeed, there was conflicting testimony before the court as to which result, in general and in this case specifically, would better further the public interests of the CON statute. SHPDA should resolve this issue, not the court.

B.

As stated, Clark also claims that SHPDA's actions were arbitrary and capricious, in violation of the due process clause. The court must reject Clark's claims for two reasons. First, it would be premature for the court to reach this issue. SHPDA has yet to hear from Clark and to decide then whether his contentions have merit. But second, even if the court were to reach the issue, it could not agree with Clark that SHPDA could find in his favor only. As the court discussed above, the evidence reflects that Clark and his lessees have a shared interest in the grandfather status of the Albertville and Guntersville facilities.

C.

City Federal Savings and Loan Association also claims that it had a protected property interest in the beds lo-

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however, that this CON was unnecessarily and improperly issued to him.

Cole also refers to a "mysterious" 1976 document in which she says Clark conveyed his CON interest in the Albertville "beds" to her. The court refuses to credit this document. First, the document is questionable because Clark did not sign it; rather, Cole says that someone signed it in his behalf. Second, the document purports to convey CON rights three years before the CON statute was enacted. In any event, a person cannot convey his or her CON interest to someone else. *See* 1975 Alabama Code § 22-21-270(e) (Michie 1990).

cated at the Albertville and Guntersville facilities which could not be taken away without notice and an opportunity to be heard. City Federal's claim is wholly lacking in merit. City Federal's property interest extended only to the buildings housing the two nursing facilities; the bank had no interest in the beds in the two facilities. City Federal was, therefore, not entitled to either notice or an opportunity to be heard regarding Cole's and Barfield's applications to relocate or replace the beds.[14]

IV. RELIEF

Because SHPDA improperly denied Clark notice of Cole's and Barfield's requests to transfer beds from Clark's facilities to their own and an opportunity to be heard on these requests, SHPDA must now offer Clark a meaningful opportunity to be heard on the requests and must further reconsider the requests de novo in light of any appropriate comments and evidence Clark might present. The court will, therefore, enter appropriate declaratory and injunctive relief to this effect.

DONE, this the 9th day of April, 1991.

/s/ Myron H. Thompson
United States District Judge

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[14] City Federal also suggests that SHPDA violated the equal protection clause in the fourteenth amendment to the United States Constitution. The claim is also premature because SHPDA has yet to hear from Clark and reach a decision. In any event, to state an equal protection claim, a plaintiff must allege that the defendant's conduct was intentionally discriminatory, that is, was based on some unjustifiable standard such as race, religion, or other arbitrary classification. *E & T Realty v. Strickland*, 830 F.2d, 1107 (11th Cir. 1987), *cert. denied*, 485 U.S. 961, 108 S.Ct. 1225 (1988). Clark makes no such allegations here.

APPENDIX B

May 2, 1991, Order
U.S. District Court for the
Middle District of Alabama, in
E.L. Clark, et al.* v. *Derrill Crowe, et al.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 86-T-139-N

E. L. CLARK and CITY FEDERAL
SAVINGS AND LOAN ASSOCIATION,
Plaintiffs,

v.

DERRILL CROWE, *et al.*,
Defendants.

ORDER

Upon consideration of the motion to alter or amend judgment filed by plaintiff E. L. Clark on April 23, 1991, it is ORDERED that the motion is denied. The State Health Planning and Development Agency may receive any evidence necessary for its decision, and this evidence may come from any source, including but not limited to plaintiff Clark and defendants Cole and Barfield. The issue of what evidence the agency may receive is a matter for the agency and not this court. However, Cole and Barfield should not be advantaged in any way by the fact that they have had use of the "beds" since the agency's original decision allowing the transfer of the beds.

DONE, this the 2nd day of May, 1991.

/s/ Myron H. Thompson
United States District Judge

APPENDIX C

November 14, 1991, Order
U.S. District Court for the
Middle District of Alabama, in
E.L. Clark, et al.* v. *Derrill Crowe, et al.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 86-T-139-N

E. L. CLARK and RESOLUTION TRUST CORPORATION,
Plaintiffs,

v.

DERRILL CROWE, *et al.*,
Defendants.

ORDER

Upon consideration of the emergency motion for temporary and permanent injunctive relief, etc., filed by plaintiff E. L. Clark on November 12, 1991, it is ORDERED that the motion is denied. The evidence reflects that SHPA has fully and carefully complied with the remedial orders of the court.

DONE, this the 14th day of November, 1991.

/s/ Myron H. Thompson
United States District Judge

APPENDIX D

Excerpt From Transcript of Hearing on Clark's Emergency Motion, November 14, 1991 U.S. District Court for the Middle District of Alabama, in *E.L. Clark, et al.* v. *Derrill Crowe, et al.*

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[17] MS. McNEIL: Your Honor, I represent SHPDA. I'm Margaret McNeill. And our position is that we follow the [18] court order exactly. Your order dated April 9, 1991 on Page 15, it states, "Clark asks that the Court to determine who holds the superior interest. The Court declines the invitation."

It goes on to say that, "SHPDA should resolve this issue, not this Court." After a lengthy hearing, it was held over a period of two weeks, there were 24 witnesses, and 1900 pages of testimony, which we brought with us. A lengthy well-reasoned order, I believe, it was 60 the pages, given by Administrative Law Judge Clark Wilkerson, it was found that Barfield and Albertville held the superior interest. SHPDA did exactly as you told us to do. We found who had the superior interest, and that's Albertville and Barfield. Therefore, we complied strictly with the court order. We've given Mr. Clark all the due process.

I believe there's a motion for clarification before Your Honor as to which kind of hearing SHPDA had to give him. There are two kinds, one before the CON Review Board, and one pursuant to the contested case provisions of the Alabama Administrative Procedures Act.

Clark requested the hearing according to the contested provisions of the Alabama Administrative Procedures Act, and this is the hearing that was held. Clark got all of the due process he has asked for. Simply that the

hearing officer found that Albertville and Barfield had the superior [19] interest. Therefore, we have done everything that you asked us to do in giving Mr. Clark all the process that you have ordered us to give him. In fact, there is a fair hearing, which is set on tomorrow, which is another step in the due process. That is set to be held. We've already given him due process on that.

So the agency has clearly gone through all of the administrative process we can. There's nothing more we can do here. Thank you, Your Honor

THE COURT: Thank you.

The Court does talk about inferior and superior interests at times. It also talks about that a person holding a CON, that is, protective property which can be taken away only if done by adequate procedural protections. The Court was under the impression that the real issue in this case, and the Court remains under the impression, is that Mr. Clark have his day in court, and in that sense that he have his day before the state agency.

Mr. Clark has now had that. It may have developed in a state agency determination, cutting off any interest he may have had. It doesn't necessarily mean he didn't have any interest, it may be that the other contender, they decided that his was inferior, or his was just cut off, depending on how you want to read it. But what was critical to me was the fact that he was heard. He got a reasonable decision.

[20] That was the thrust of the order that I issued. I wanted the agency to have the freedom to conduct a de novo hearing. I did not want a straitjacket here, except with regard to the matter that Mr. Clark not be disadvantaged by anyone. I find no failure to comply with the Court's immediate order. The motion is denied.

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